89-1255

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC.
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since the Interstate Commerce Act renders void any attempt by a motor carrier to limit freight loss and damage liability to less than the full value of the freight, and provides for an exception to this rule only where the shipper declares or agrees in writing to a lower value for a shipment, was it lawful for the Interstate Commerce Commission to approve motor carrier tariffs which purport to limit liability, without a shipper's declaration of value, to a value named in the tariff?

Was it arbitrary, capricious or contrary to law for the Commission to summarily approve such tariff limitations in a decision based expressly upon a "virtually unbroken string of decisions" upholding like tariffs, when the decisions on the issue by the circuits are in conflict?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court below:

National Small Shipments Traffic Conference, Inc.
The Health and Personal Care Distribution Conference, Inc. (formerly named Drug and Toilet Preparation Traffic Conference, Inc.)
Interstate Commerce Commission
United States of America
National Freight Claims and Security Council of American Trucking Associations
National Motor Freight Traffic Association, Inc.
Roadway Express, Inc.

Petitioners, as named on the cover hereof, have no parent companies, subsidiaries or affiliates.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case. That court denied a petition to review a decision of the Interstate Commerce Commission which had dismissed a complaint filed by these Petitioners.

OPINION AND DECISION BELOW

The opinion of the United States Court of Appeals for the Third Circuit has been published as *National Small Shipments Traffic Conference v. United States,* 887 F.2d 443 (3d. Cir.

1989), and is attached as Appendix A. The Third Circuit's order denying rehearing is attached as Appendix C.

The Decision of the Interstate Commerce Commission dismissing Petitioners' complaint in ICC Docket No. MC—C-30102, *National Small Shipments Traffic Conference, Inc., et al. v. Consolidated Freightways Corp., et al.*, unpublished decision served January 23, 1989, is attached as Appendix B.

JURISDICTION

The opinion and judgment of the Third Circuit were entered on October 10, 1989. A timely petition for rehearing was denied on November 6, 1989. (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Interstate Commerce Act:

49 USC §11707 Liability of common carriers under receipts and bills of lading

> (a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title and a freight forwarder shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier or freight forwarder and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property. . . .
>
> * * *

(c)(1) A common carrier and freight forwarder may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

* * *

(c)(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

49 USC §10730 Rates and liability based on value

(b)(1) Subject to the provisions of paragraph (2) of this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or a freight forwarder may, subject to the provisions of this chapter (including, with respect to a motor carrier, the general tariff requirements of section 10762 of this title), establish rates for the transportation of property (other than household goods) under which the liability of the carrier or freight forwarder for such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier or freight fowarder and shipper if that value would be reasonable under the circumstances surrounding the transportation.

STATEMENT OF THE CASE

Alarmed by the efforts of a number of motor freight carriers to limit their liability to less than the statutory full value

recovery, these petitioners, associations of regular customers of the carriers, filed a complaint with the Interstate Commerce Commission against ten carriers. The complaint was addressed to tariff provisions whereby such carriers had published so-called automatic releases of liability to amounts stated in the tariff items. The Commission was asked to find such tariff provisions unlawful because they are contrary to Congressional intention in the Interstate Commerce Act, 49 U.S.C. §§11707 and 10730, which respectively impose (1) full value liability and (2) a limited exception to full liability only when the "shipper" (customer) makes a "written declaration" or a "written agreement" as to the value of the shipment.

The value limit authorized by the statute as an exception to the general rule of carrier liability for the full value of any loss or damage in transit is commonly known as a "released value". The shipper executes a written release setting the value of its freight at a level which becomes the upper limit of carrier liability. The carrier practice at issue in this case involves "automatic releases", under which the carrier purports to release the value for the shipper through a provision in the carrier's tariff whenever the shipper does not execute a release. Thus, the carrier would arrogate to itself an election which the statute leaves to the shipper.

In providing for a general rule of full liability and an exception for shipments tendered at released values, the Act codifies the comon law as set forth in cases such as *Hart v. Pennsylvania R.R.*, 112 U.S. 331 (1884). Since 1884, this Court,[1] as well as the lower courts and the ICC, have frequently been called on to address the proper scope of carriers' attempts

[1] See *Adams Express v. Croninger*, 226 U.S. 491 (1913); *New York, N.H. & H.R.R. v. Nothnagle*, 346 U.S. 128, 134-35 (1953). This Court most recently addressed a related issue last term, in *Chan v. Korean Air Lines Ltd.*, 109 S.Ct. 1676 (1989).

to limit their liability for loss or damage to shippers' property. In past cases, the Commission has consistently rejected automatic releases.[2]

However, in the proceeding below, without taking evidence or receiving briefs on the merits, the Commission summarily dismissed the complaint on the grounds that judicial precedents already had well-settled the issue to the effect that the carriers could self-limit their liability by naming a value limit for liability purposes in their tariffs. Ignoring the majority of judicial decisions on this issue, the Commission declined to make its own analysis of the statutes. In effect, the Commission made a non-decision, turning its back on fifty years of its own administrative construction of this statute to the contrary.

The Commission's decision revokes the statute and leaves the shipping public bereft of the full value recovery which Congress established as the rule. The protective requirement of a written shipper declaration of a released value is swept away in favor of allowing carriers to establish value limits by their own tariffs in the absence of a value declaration by the shipper, notwithstanding the statute to the contrary. In this way, the exception of limited liability becomes the rule, and all shippers' freight is now fair game when they do no more than sign their names to accept a bill of lading[3] with no value stated on it.

Petitioners filed for judicial review of the agency's decision in the Third Circuit. Review of the agency's decision by the Third Circuit was pursuant to its jurisdiction under the Hobbs

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[2]See *Released Rates — Small Shipments Tariff*, 361 ICC 405, 415-17 (1979).

[3]The same statutory provision which establishes full value recovery also requires that a bill of lading be executed for every shipment via a motor carrier. 49 U.S.C. §11707(a)(1).

Act, 28 U.S.C. §§2321(a) and 2342(5). On October 10, 1989, the Third Circuit filed an Opinion denying the petition for review.

In the face of a Commission decision which was grounded on the premise that judicial precedents had already settled the question raised under the statute, the Opinion's affirmance of the ICC Decision rests on the proposition that a "reviewing court may not impose its own construction of a statute when the agency administering that statute has previously construed it." 887 F.2d at 447, Appendix A at A-12. Thus far, this case has been decided by a peculiar mirror effect under which (1) the Commission considered itself bound by judicial precedents which it found uniform (by ignoring the existence of the decisions to the contrary) and (2) the Court of Appeals considered itself bound by the Commission's construction of the statute, even though the Commission never made an independent construction of the statute. This is a clear misreading of the standard of review established in *Chevron USA Inc. v. NRDC Inc.*, 467 U.S. 837 (1984). At this juncture, this Court is the first forum in which these Shipper Conferences will be able to obtain an independent analysis of the controlling provisions of the Interstate Commerce Act.

REASONS FOR GRANTING THE WRIT

I. AN IMPORTANT QUESTION IS PRESENTED UNDER FEDERAL STATUTES WHICH SHOULD BE SETTLED BY THIS COURT.

Prior hereto, a shipper of freight had been secure in the knowledge that, unless it made a written declaration of value on the bill of lading, it would be fully recompensed for loss and damage in transit. The ICC Decision and the Opinion of the court of appeals below change all that, leaving the shipper

to the mercy of whatever value recovery limits the carriers choose to put in their tariffs. Whereas the printed bill of lading presented to the shipper contains a section[4] in which the shipper is invited to insert a value if it wants to declare or "release" the value of the shipment for recovery purposes, the decision under review holds that the carrier can limit the value for the shipper by a tariff provision, even if the shipper wants full carrier liability and has declined to execute the release on the bill of lading. This is exactly what Congress thought it was preventing by enacting the governing statutes.

The effect of the ICC decision is to shift most of the burden for loss or damage to a shipper's freight from the carrier, in whose custody the loss or damage occurred, to the shipper. Typically, released value provisions cover only a small fraction of the actual value of the freight. This result is clearly lawful where the shipper knowingly, and in writing, agrees to the released value. The statute, principles of estoppel, and the opportunity for shippers to make other arrangements, such as insurance, combine to support the traditional released value declaration as a matter of law and as sound policy. *None* of these factors supports automatic releases, as to which the Commission's own earlier characterization of "trap for the unwary" is an understatement.

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[4]Appendix D hereto is a copy of the uniform bill of lading. It makes provision for the shipper to elect whether to release the value of its shipment and it states that executing the value declaration is a prerequisite to a released value:

> Note: Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
>
> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding_____ per _____.

An occasional shipper seeing the released value section of the bill of lading would certainly not be likely to understand that leaving it blank meant agreeing to the lowest value named in a carrier's tariff. The shipper would naturally understand that it could recover the actual value of loss or damage, as provided by statute. The frequent shipper, aware of the released value concept, would recognize the released value section of the bill of lading for what it has traditionally been: a means by which the shipper may agree to limit carrier liability in exchange for a special rate. The accepted way to ship at full value liability has always been simply to leave the released value section on the bill of lading unexecuted.

Because the ICC Decision approves a trap for all shippers, both occasional and frequent, this case warrants review by this Court. The importance of this case is compounded by the fact, discussed in the next section of this Petition, that the Third Circuit Decision and court decisions relied on by the ICC are in conflict with other court decisions, and with state laws.

Transportation by motor carrier pervades the American economy. There can be few, if any, businesses which neither ship nor receive freight via motor carrier. Interstate transportation, by definition, crosses state lines, and among those crossed lines are the lines separating frederal appellate circuits. At present, a shipper who agreed to no released value and who learned to its dismay, upon presenting a claim for loss or damage, that its carrier had an automatic release provision in its tariff, might find its right to recovery sustained or foreclosed, depending on the circuit in which it pursued its claim. Moreover, a number of states have outlawed automatic releases in intrastate commerce. A shipper who deliberately left the released value provision on the bills of lading blank to obtain full carrier liability, and who shipped its goods interstate to a warehouse, and then intrastate to various retail

outlets, could find its claim either paid in full, or reduced to a pittance, depending on where the loss or damage took place. This is an intolerable situation, which demands action by this Court to correct the errors made below.

Efforts by carriers to limit their liability for what they lose or destroy have been going on for centuries. Congress considered this problem and handled it by three interrelated provisions which can be briefly summarized:

> 1. The motor carrier is responsible for the full "actual loss or injury to the property". 49 U.S.C. §11707(a)(1).
>
> 2. The carrier may not limit its liability unilaterally by a "tariff". 49 U.S.C. §11707(c)(1).
>
> 3. As an exception to the rule of full value liability, a carrier may "establish rates" subject to a limited value recovery if the "shipper" makes a "written declaration" or a "written agreement" with the carrier to that effect. 49 U.S.C. §10730(b)(1).

These provisions show the will of Congress that the full value recovery standard not be defeated by the carrier itself by ***any*** provision that it might devise in its tariff. While there is an exception to full value liability, the exception is made absolutely dependent upon the shipper's written declaration or agreement in writing to a released value. And that is accomplished by the shipper executing the released value clause provided on the bill of lading for that purpose, as reproduced above.

The Congressional intent is totally defeated by the Commission's Decision finding that an automatic release inserted in a carrier's tariff meets the terms of the shipper-released value exception in the statute. The shipper is left in the same awful position it would be in if Congress were to repeal Sec-

tions 11707 and 10730. This Decision places it completely within the carrier's control whether or not to accept full value liability and at what level it wants to limit its liability. The shipper has no say in it, and the released value can be accomplished entirely by the carrier in its tariff (with no written statement of value required of the shipper).

As a rationale for defeating the Congressional intent manifested in these statutory provisions, both the Commission's Decision and the Opinion of the Third Circuit rely upon (1) the general principle that the shipper is bound by the rates and charges in a carrier's tariff (whether or not it has actual notice of them) and (2) a carrier's tariff provision limiting liability to an amount stated therein, even if the shipper makes no declaration of value on the bill of lading[5] (App. A, p. 8, App. B, p. 8). The defect in this rationalization is that it repeals the statute.

As noted, Section 10730(b)(1) allows a limited value recovery only where the "shipper" makes a "written declaration" or a "written agreement" stating the value. And Section 11707(c)(1) states plainly the Congressional intent that the carrier may not limit the "amount of recovery" by a "tariff filed with the Commission", declaring such to be "void"[6] unless the carrier obtains the shipper's written declaration of or agreement to that value. Congress made a significant exception to the general principle of binding the shipper by tariff provisions when it enacted Sections 11707(c)(1) and 10730(b)(1), which provide that a tariff provision may not be used by the

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[5]As expressed in the Third Circuit Opinion: "The I.C.C. determined, and we agree, that a bill of lading, taken together with the filed tariff containing an inadvertence clause, can constitute a written agreement between the carrier and shipper." (App. A, at A-8).

[6]Indeed, the purpose of Petitioners in filing a complaint with the Commission was to have automatic release provisions removed from the tariffs as void.

carrier to limit the amount of its damages and that the only way to reach that result is by a specific written declaration or agreement of value by the shipper.

In framing these provisions, Congress is presumed to have been aware of the general principle that the shipper is bound by the carriers' tariffs. The carrier cannot supervene the law by relying upon that general principle to legalize tariff provisions that are specifically made void by statute. *Boston & M.R.R. v. Piper*, 246 U.S. 439, 445 (1918). The statute clearly provides that there must be a written declaration or agreement stating value by the shipper and that a provision in a carrier's tariff purporting to take the place of the declaration is void.

The decision to approve automatic releases on a "constructive agreement" theory cannot be reconciled with either the words or the purpose of Congress in enacting the Carmack Amendment. It amounts to displacing the one statutory requisite — written shipper agreement — with two givens of which Congress already took cognizance in Section 11707 — a bill of lading and a tariff. Constructive shipper knowledge of tariffs cannot be allowed to override the requirement that shippers must execute written releases of the value of their goods for the released value exception to apply.

As the Commission should have known, and would certainly have been told if it had held a proceeding instead of dismissing the Shipper Conferences' complaint summarily, constructive notice is in most cases no notice at all.[7] Most shippers

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[7]See *West Coast Truck Lines, Inc. v. Weyerhauser Co.*, No. 89-35115 (9th Cir., decided January 4, 1990) (1990 Westlaw 155, page 23 of 31): "The ease of filing tariffs and the sheer number filed no longer makes it appropriate to allocate the burden of discovery of the filed rate to the shipper in all cases." If shippers cannot fairly be presumed to know the tariff rate, how can they be presumed to know whether the carrier has adopted an automatic release?

will not learn of the existence of an automatic release in a carrier's tariff until they file a claim for loss or damage, and are told that their recovery is limited to ten cents per pound.

Of course, even if constructive notice were practically effective and legally sufficient (and it is neither), there remains the statutory requirement of a ***written*** shipper declaration or agreement to a released value. Under the ICC Decision, which relies on one line of court cases, this requirement is met by the fact that the shipper signs, or puts its name on, the bill of lading. But this merely serves to establish the existence of a contract of carriage. The law requires a separate agreement, affirmatively accepted by the shipper, in order to invoke the exception to the normal rule of full carrier liability. See *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 134-35 (4th Cir. 1967) and *Caten v. Salt City Movers & Storage Co.*, 149 F.2d 428, 432 (2d Cir. 1945).

Indeed, the uniform bill of lading implements the statutory provision by providing a specific section on the bill for the shipper to choose to enter a value. In order for the Commission's Decision to be correct, one would have to accept the propositions (1) that the carriers have a right to override the statutory prohibition against a carrier limitation of value in the tariff and (2) that the shipper, presented with the election of whether or not to insert a value limit in a designated section of the bill of lading, is bound by a value stated in the tariff whether it executes that section or not.

It cannot be overlooked that, if the Commission's conclusion is correct that the carrier-made tariff plus the shipper's signature on the bottom line of the bill of lading are all that are needed to limit the amount recoverable for damages, the carriers would be given the right to limit value unilaterally by their tariffs. This sweeps away the Congressionally-adopted

principle of full value recovery with an exception limited to circumstances where a shipper declares a value. The Decision creates a whole class of bailees who are no longer responsible for the damages to goods in their custody. When it is considered that virtually everything that arrives at a retail store comes by truck, this creates an awesome gap in the law.[8]

In the Third Circuit Decision, 887 F.2d at 445, the court held that the statute is not clear, and therefore proceeded to the second prong of the *Chevron* test — whether the agency adopted a permissible interpretation of the statute — and deferred to the ICC's deference to the court decisions upholding automatic releases. But it is difficult to understand how Congress could have been more clear than it was. Because the ICC Decision cannot be reconciled with the plain meaning of the statute, it must be reversed.

II. THE OPINION OF THE THIRD CIRCUIT IS IN CONFLICT WITH THE OPINIONS OF OTHER CIRCUITS ON THIS SAME ISSUE.

The Commission first considered released values in 1936, soon after motor carriers were placed under its jurisdiction. Its initial decision involving released values was *Released Rates Order MC-1*, an unpublished decision issued January 16, 1936. In order to implement the provisions of the statute, the Commission included this prerequisite for the released values there authorized (emphasis added):

> Note: The value declared in writing by the shipper, or agreed upon in writing as the released value

[8]We estimate the value of the freight shipped by general freight motor carriers at approximately $150 billion per year. A carrier-made tariff limit of 10 cents per pound, as exampled in the Commission's Decision, would limit recovery to only $3 billion [assuming an average real value of $5.00 per pound].

> of the property, as the case may be, *must be entered on Shipping Order and Bill of Lading* as follows:
>
> > The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per pound for each article.[9]

That decision, which plainly read the released value statute as requiring affirmative action by the shipper to declare a value on the shipping order or bill of lading, has been followed by the Commission up until this case. This issue was raised in a series of cases before the Commission over the years and it ruled that automatic releases in a tariff are not allowed. These decisions include *Released Rate Rules — National Motor Freight Classification*, 316 ICC 499, 512-13 (1962); *Released Rates — Small Shipments Tariff*, 361 I.C.C. 405, 413 (1979) ("we shall require shippers to affirmatively release liability") and *Transconex Inc. — General Commodities*, unpublished decision served November 15, 1982,[10] *affirmed without opinion, Drug and Toilet Preparation Traffic Conference v. I.C.C.*, No. 83-1587 (D.C. Cir. 1984).

In the instant Decision, the Commission cited *Machines, Data Processing, Classification Ratings*, 353 I.C.C. 661 (1977) as evidence that it had not consistently ruled against automatic releases over the years. However, that decision shows no mention or discussion of an automatic release and it was not an issue raised in that case. Whatever faint value might reside in a decision on an issue not raised or discussed is certainly erased by its later decisions, *supra*.

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[9]A copy of Released Rates Order MC-1, along with the appendix to that order showing the above Note, are attached hereto as Appendix E.

[10]A copy of the *Transconex* decision is attached hereto as Appendix F.

While the issue of automatic releases was not discussed in the decision in *Machines*, in every case in which the issue was discussed by the Commission, automatic releases were rejected. Although an agency, even after 50 years of construction, is not precluded from making a new construction of a statute (assuming, *arguendo*, that the statute is unclear), it would have to present a compelling rationale to justify its departure from its settled construction. Here, the Commission not only declined to develop a record on this important issue, but its "new" construction is based simply upon a misreading of judicial precedents as settling the issue beyond question, rather than the deliberate analysis required for a new and diametrically opposite construction of the statute.

The instant Decision of the Commission was based squarely on its erroneous conclusions that as a result of court decisions upholding automatic releases in tariffs "on numerous occasions . . . it is beyond question that inadvertence clauses are lawful under Sections 11707 and 11730"; that "there is no suggestion in any court decision on this issue" to the contrary; and that, because there is a "virtually unbroken string of decisions upholding the legality of inadvertence clauses in tariffs" (App. B, pp. 3, 4, and 5), it was constrained to dismiss Petitioners' complaint.

There are several problems with this analysis, even aside from the fact that the statute is to the contrary. In the first place, these statements are not statutory analyses, but merely reflect the Commission's limited reading of relevant cases. The Third Circuit erred in giving *any* deference to this aspect of the decision below, since courts can reach legal conclusions based on prior court decisions at least as well as agencies. See *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169-70 (D.C. Cir. 1986), where it is observed that deference under *Chevron* to an agency's attempt to interpret an "admittedly ambiguous" statute "is only appropriate when the agency has

exercised its *own* judgment. When, instead, the agency's decision is based on an erroneous view of the law, its decision cannot stand." (Emphasis in original.) That case involved an agency's misreading of a decision by this Court, and this case involves the ICC's failure to recognize the existence of conflicting authority, but the lesson is the same. *Chevron* deference, which the Third Circuit found controlling herein, was unwarranted.

In the second place, to reach its conclusions as to what it regarded as settled law, the Commission had to overlook or overrule a series of significant judicial decisions to the contrary. Indeed, the tariff item cited as an example[11] of an automatic release in the Decision is the same provision which was at issue in *General Electric Co. v. McLean Trucking Co.*, No. 85-417-A (E.D. Va. 1985). That court held that such a tariff limitation contravenes 49 U.S.C. §§10730 and 11707, because the statute requires that the shipper make a written declaration or agreement. As noted in the Third Circuit's Opinion herein, the Commission rejected the *General Electric* case. (App. A, p. 11).

Decisions by the First, Second, Fourth and Ninth Circuits have considered tariff automatic releases and found them contrary to statute.

In *Anton v. Greyhound Van Lines*, 591 F.2d 103 (1st Cir. 1978), the Court of Appeals for the First Circuit held that a 60 cents per pound value in a tariff item stating that the freight "will be deemed released" to such value is invalid to self limit the carrier's liability. The court held that the shipper must

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[11]That tariff item applies to "used machinery and used agricultural implements" and states that "if consignor fails to declare a released value at time of shipment, shipment will be subject to the lower released value herein" (10 cents per pound) (App. B, p. 2).

take specific action to enter a "voluntary valuation" of its goods. 591 F.2d at 108.

In *Gordon H. Mooney Ltd. v. Farrell Lines, Inc.*, 616 F.2d 619 (2d Cir.), *cert. denied*, 449 U.S. 875 (1980), the court held, as to a motor common carrier, that "unless the valuation was written on the bill of lading, Maislin [the carrier] may not limit its liability under the statute." 616 F.2d at 626. In *Caten v. Salt City Movers & Storage Co.*, 149 F.2d 428 (2d Cir. 1945), the carrier attempted to apply a 30 cents per pound valuation limit from its tariff, but the court held that there needs to be a written declaration by the shipper of that amount. 149 F.2d at 432.[12]

In *Chandler v. Aero Mayflower Transit Company*, 374 F.2d 129, 135 (4th Cir. 1967), the Fourth Circuit observed that a shipper must agree to a released value "in the same sense that one agrees or assents to enter into a contractual obligation," and quoted *Caten v. Salt City Movers & Storage Co.*, 149 F.2d at 432, as follows:

> The statute makes it abundantly clear that the carrier's common law liability for full actual damages, whether or not caused by its negligence, is imposed when it accepts goods for carriage, unless a certain specified agreement limiting that liability has been made as the result of an equally certain speci-

[12]In *Mechanical Technology, Inc. v. Ryder Truck Lines*, 776 F.2d 1085, 1089-90 (2d Cir. 1985), one of the cases on which the ICC relied in its Decision, Judge Winter suggested in his separate concurrence that the majority had, *sub silentio*, discarded *Gordon H. Mooney*. However, the majority declined to go so far, stating "we are not convinced that every failure properly to complete the bill of lading would represent a 'fair opportunity' to choose a lower level of liability. 776 F.2d at 1089, n.5. See also *id.* at 1088: "The existence of a tariff is not in itself sufficient to limit liability." Despite these reservations, Petitioners believe *Mechanical Technology* cannot be reconciled with the statute and was wrongly decided.

> fied action by the shipper in respect to a *voluntary valuation of his goods.*

374 F.2d at 135, n.10, emphasis added by the Fourth Circuit.

In the Ninth Circuit, the Court of Appeals similarly held that leaving open the blank on the bill of lading for insertion of value and a tariff provision purporting to limit value are not enough to meet the statutory test for released value. *Mass v. Braswell Motor Freight Lines*, 577 F.2d 665 (9th Cir. 1978). To the same effect is *Thomas Electronics, Inc. v. J.W. Taynton Co.*, 277 F.Supp. 639, 642 (M.D. Pa. 1967) where the court, after noting the blanks for inserting value on the standard bill of lading, concluded:

> Shippers have no legal duty to state the value of their goods on the Bill of Lading and their failure to do so will not destroy the protection afforded them by Section 20(11) of the Interstate Commerce Act.

Accord, *Fine Foliage of Florida, Inc. v. Bowman Transportation, Inc.*, 698 F.Supp. 1566, 1575 (M.D. Fla. 1988).

The ICC Decision cited a few judicial decisions which favored automatic releases (decisions by two district courts and by the Second and Seventh Circuits). However, the cases discussed above do not evidence the unbroken line of precedents which the Decision envisioned as settled law, but a clear conflict among the circuits and among lower courts. Indeed, the weight of authority appears to be against the view which the Commission adopted as "beyond question". (App. B, p. 6). While the Commission is certainly entitled to take its own position on an issue the courts have found divisive, it did not do so in the proceeding below.

This conflict in the cases concerning the lawfulness of automatic releases should be resolved in a context other than that of the private litigation of loss and damage claims which

has resulted in conflicting opinions. Here, the shipping public is represented by two national associations of shippers, the trucking industry is represented, *inter alia*, by the American Trucking Associations, and the ICC is a party. The issues will be fully briefed and argued.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February 5, 1990

APPENDIX A

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and The Health and Personal Care Distribution Conference, Inc., Petitioners,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents,

Roadway Express, Inc.; National Freight Claims & Security Council of American Trucking Associations; National Motor Freight Traffic Association, Inc., Intervenors.

No. 89-3163.

United States Court of Appeals,
Third Circuit.
Argued Sept. 7, 1989.
Decided Oct. 10, 1989.

Rehearing and Rehearing In Banc
Denied Nov. 6, 1989.

Associations of companies that were regular shippers petitioned for review of the decision of the Interstate Commerce Commission that tariffs containing inadvertence clauses were not per se illegal. The Court of Appeals, Aldisert, Circuit Judge, held that the decision was proper.

Petition for review denied.

1. Commerce — 161

Where neither the plain language and legislative history of sections of the Interstate Commerce Act nor the case law in-

›ting the sections was clear, Court of Appeals would not ..pret statutory language de novo but was required to determine whether Interstate Commerce Commission's decision was based on a permissible interpretation. 49 U.S.C.A. §§ 10730, 11707.

2. Commerce — 89(2)

Interstate Commerce Commission properly determined that inadvertence clauses in tariffs, providing that shipments will be insured at the lowest rate permited in the tariff if the shipper fails to declare value, were not per se illegal under provisions of the Interstate Commerce Act; inadvertence clause in published tariff, taken together with bill of lading, could constitute a written agreement between carrier and shipper. 49 U.S.C.A. §§ 10730, 11707.

Daniel J. Sweeney (argued) and John M. Cutler, Jr., Washington, D.C. for petitioners.

Virginia Strasser (argued), I.C.C., Robert Burk, Craig M. Keats, Office of Gen. Counsel, John P. Fonte, John J. Powers, III, and James F. Rill, U.S. Dept. of Justice, Appellate Section, Antitrust Div., Washington, D.C., for respondents.

Kenneth E. Siegel (argued), Robert S. Digges, Jr., Alexandria, Va., and William W. Pugh, Gen. Counsel, Nat. Motor Freight Traffic Assn., Inc., Alexandria, Va., for intervenors/respondents.

Before MANSMANN, NYGAARD and ALDISERT, Circuit Judges.

OPINION OF THE COURT

ALDISERT, Circuit Judge.

In the world of commercial shipping freight by common or contract carrier, as regulated by the Interstate Commerce

Commission ("I.C.C. or Commission"), the shipper ordinarily declares the freight's value in the bill of lading. Some tariffs filed with the I.C.C. contain a clause providing that if the shipper fails to declare a value, the shipment will be insured at the lowest rate permitted in the tariff. This is commonly known as the "inadvertence clause."

The question for decision in this petition for review of an order of the Commission, by National Small Shipments Traffic Conference, Inc., and the Health and Personal Care Distribution Conference, Inc. ("Petitioners"), is whether the Commission properly decided that tariffs containing inadvertence clauses are not per se illegal. We hold that the Commission did not err, and therefore, deny the petition for review.

Jurisdiction was proper in the Interstate Commerce Commission based on 49 U.S.C. § 17. Jurisdiction on appeal is proper based on 28 U.S.C. §§ 2321(a), 2342(5). The petition was timely filed under Rule 4(a), F.R.App.P.

I.

The petitioners are associations of approximately 300 companies that are regular customers of the general freight trucking industry. They filed a complaint with the Commission seeking to have tariff provisions containing "automatic release" or "inadvertence clauses" declared void.

They claim that provisions, such as those contained in Item 3010-C of Roadway Express Tariff 301-C, I.C.C. RDWY 301-C, are per se violations of sections 11707 and 10730(b) of the Interstate Commerce Act ("Act"). 49 U.S.C. §§ 10730, 11707. The Roadway Express Tariff provides:

> a. Commodities as described above, other than new will be accepted for transportation by carrier subject to the following:

(1) Released to value exceeding $.10 per pound . . . 85% of applicable Class Rates.

(2) Released to value exceeding $.10 per pound, but not exceeding $1.00 per pound . . . 95% of applicable Class Rates.

(3) Released to value exceeding $1.00 per pound, but not exceeding $2.50 per pound . . . 97% of applicable Class Rates.

(4) When consignor declares actual value exceeding $2.50 per pound, shipment will be rated at . . . 150% of applicable Class Rates.

2. If consignor fails to declare a released value at the time of shipment, shipment will be subject to the lowest released value herein.

3. Failure of the consignor to declare that commodity as "used" shall not alter the application of this item.

Brief for Petitioner at 7-8.

Petitioners' attack centers on Item 2, commonly known as the "inadvertence clause." If such a clause is present in a tariff, and a shipper fails to declare a value in the bill of lading, then the shipper is insured at the lowest rate permitted in the tariff. The shipper also generally pays for shipping at the lowest rate permitted in the tariff. The tariff is not part of the bill of lading. It is a separately published statement that is incorporated by reference into the bill of lading.

The I.C.C. considered and rejected petitioners facial challenge to tariffs containing inadvertence clauses. The Commission held that *Machines, Data Processing, Classification Ratings*, 353 I.C.C. 661 (1977), and numerous other decisions, made clear that "including an inadvertence clause in a released rates tariff is [not] a proper basis for finding the tariffs

. . . unlawful and ordering them cancelled." *National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, Inc. v. Consolidated Freightways Corp. of De.*, No. MC-C-30102, at 4 (I.C.C. Jan. 13, 1989) [hereinafter *"I.C.C. Op."*].

II.

Like most administrative appeals, this case turns on the standard of review. The Supreme Court in *Chevron U.S.A., Inc. v. N.R.D.C., Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) held:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguous expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43, 104 S.Ct. at 2781-82 (footnotes omittted).

Before us petitioners reassert the argument they made before the Commission that inadvertence clauses are per se illegal based on sections 10730(b) and 11707 of the Act. 49 U.S.C. §§ 10730(b), 11707. They argue that the language and legislative intent of Congress in enacting these sections is clear,

and that therefore, this court is constrained to follow that clear intention and declare tariffs containing inadvertence clauses void.

[1] We do not share petitioners' view that there is a pristine clarity to sections 10730 and 11707. Neither the plain language, and its legislative history, nor case law interpreting these sections is clear. Accordingly, we do not interpret the statutory language *de novo*, but are required to determine whether the agency's answer is based on a "permissible interpretation" of the statute. *Chevron*, 467 U.S. 843, 104 S.Ct. at 2782.

Our starting point is the statutory language:

> (b)(1) Subject to the provisions of paragraph (2) of this subsection, a motor common carrier providing transportation . . . [may] establish rates for the transportation of property (other than household goods) under which the liability of the carrier . . . is limited to a value established by written declaration of the shipper or by written agreement between the carrier . . . and shipper if that value would be reasonable under the circumstances surrounding the transportation. (2) Before a carrier . . . may establish a rate for any service under paragraph (1) of this subsection, the Commission may require such carrier . . . to have in effect and keep in effect, during any period such rate is in effect under such paragraph, a rate for such service which does not limit the liability of the carrier. . . .

49 U.S.C. § 10730.

> (a)(1) A common carrier providing transportation or service . . . shall issue a receipt or bill of lading for the property it receives for transportation under this subtitle . . . [and is] liable to the person entitled to

> recover under the receipt or bill of lading . . . [for] the actual loss or injury to the property. . . .
>
> (c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.
>
> * * * * * *
>
> (4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

49 U.S.C. § 11707.

III.

The petitioners present a series of arguments to support their position. We have considered each contention and conclude that most do not require extensive discussion.

A.

They argue that section 11707(c)(1) expressly prohibits tariff liability disclaimers. But the plain language of that section prohibits only those tariff disclaimers that are in violation of section 11707. By implication, it would, therefore, follow in logical order that this subsection endorses tariff disclaimers that comply with section 11707. This is a classic example of a disjunctive syllogism. Either A or B; but not A; therefore, B. Or as the statute provides: a carrier may not limit liability except as permitted in this subsection; a limitation of liability in violation of § 11707 is void, therefore, a limitation of liability consistent with the regulations of § 11707 is valid. *See* R.

ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 163 (1989).

Alternatively they contend that when read together, sections 10730 and 11707 require that any release of liability be "established by written declaration of the shipper, or by a written agreement," and the publication of an inadvertence clause in a tariff does not satisfy the requirements of a written agreement. The I.C.C. determined, and we agree, that a bill of lading, taken together with the filed tariff containing an inadvertence clause, can constitute a written agreement between the carrier and shipper. *I.C.C. Op.* at 3. This determination was premised on the long-standing principle that a shipper is deemed to be aware of, and agrees to be bound by, the tariff under which it is shipping, and that before carriage can begin, the parties enter into a contract of carriage embodied in a bill of lading. Neither the language, nor legislative history of sections 10730 or 11707 prohibit such an interpretation.

B.

Petitioners then argue that the legislative history of the statute clearly prohibits inadvertence clauses. Petitioners begin by outlining the development of the common law rule of full liability for carriers. *See Coggs v. Bernard*, 2 Ld.Raym. 909, 92 Eng. Rep. 107 (1703). This rule was codified in 1906 in the Carmack Amendment (currently codified at 49 U.S.C. § 11707) which prohibited carriers from limiting their liability in any way. But the courts loosened this requirement and allowed shippers to declare the value of their goods and be charged lesser rates for goods of lesser value. After this occurred, carriers began charging exorbitant rates for shipments insured at full value. *See Adams Express Co. v. Croninger*, 226 U.S. 491, 509, 33 S.Ct. 148, 153, 57 L.Ed. 314 (1913). This prompted swift Congressional reaction. Congress enacted the Cummings Amendment (now codified primarily at 49 U.S.

§ 10730), which allowed carriers to limit their liability, but gave the I.C.C. the power to approve rates. By 1980, the requirement of I.C.C approval of tariff rates was removed by the Motor Carrier Act. Petitioners advance the theory that the 1980 Motor Carrier Act in effect rolled back the law to *Adams Express*. From these premises they argue that limitation of liability by the carrier can be brought about only when the shipper declares the value of the goods. We reject this theory for several reasons. First, there is no indication that at the time of *Adams Express*, our courts were ever introduced to, or discussed, inadvertence clauses. Second, there is nothing in the language or legislative history of the 1980 Motor Carrier Act which indicates that Congress even thought about the validity of automatic release clauses. *See generally*, H.R.Rep. No. 1069, 96th Cong., 1st Sess. 1-103, *reprinted in* 1980 U.S. Code Cong. & Admin.News 2283-2338. Third, we are satisfied that Congress intended to authorize the Commission to approve released rate provisions, and left the question of inadvertence clauses as one properly for the Commission to resolve in filling in the gaps implicitly or expressly left by Congress. *See Drug & Toilet Preparation Traffic Conf., Inc. v. United States*, 797 F.2d 1054, 1058 (D.C.Cir.1986).

Indeed, Congress has delegated to the I.C.C. broad discretion in dealing with tariffs, *see* 49 U.S.C. § 10762 (I.C.C. prescribes requirements for tariffs), and value limitations, 49 U.S.C. § 10730(b) (requires that limited value be reasonable, a determination that is left to the I.C.C. under section 10701). The Administrative Procedure Act provides that when an agency is given discretion to make a decision, it can only be overturned if it is arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A).

IV.

[2] We conclude that the I.C.C. did not err in concluding that inadvertence clauses in tariff provisions are not per se illegal. The Commission applied basic contract laws and determined that the presence of such a clause in a published tariff, taken together with a bill of lading, may constitute a written agreement.

A.

Petitioners' primary response to the I.C.C.'s written agreement concept is to contend that such a practice was not permitted at common law. Brief for petitioners at 25, 29. This argument lacks merit. We do not examine here isolated fundamentals of common law tort liability of centuries past. We are looking at contract limitations to tort liability that are also recognized at common law. We are looking also at the gloss applied by federal statutes and I.C.C. regulations over the years. *See e.g., Ruston Gas Turbines, Inc. v. Pan American World Airlines*, 757 F.2d 29, 32 (2d Cir. 1985) (court upheld the validity of an inadvertence clause contained in a tariff finding that the shipper made a "fair, open, just and reasonable agreement").

Moreover, the Commission's decision was consistent with recent decisions holding that where a tariff contained an inadvertence clause, the parties had in reality entered into a written agreement. *E.g., Mechanical Technology, Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085 (2d Cir.1985); *W.C. Smith, Inc. v. Yellow Freight Systems, Inc.*, 596 F.Supp. 515 (E.D. Pa.1983). The Commission noted that the petitioners here participated in another proceeding before the Commission, *Machines, Data Processing, Classification Ratings* 353 I.C.C. 661 (1977). In that case these same petitioners supported adoption of a released rates provision that contained an in-

advertence clause. The released rates provision at issue in this case was patterned after the released rates provision in *Machines. See I.C.C. Op.* at 4-5.

B.

Petitioners ask that we reject the I.C.C. decision in this case and all other authority condoning inadvertence clauses. They assert that this line of cases was incorrectly decided and should be abandoned. Petitioners advocate adopting the teachings of *General Electric Co. v. McLean Trucking Co.*, C.A. No. 85-0417-A (E.C.Va.1985) (unpublished) (Brief for National Motor Freight Traffic Assoc., appendix G). We reject petitioners' argument. We note that the *General Electric* case has not been followed by most courts, *see e.g., Mechanical Technology, Inc.*, 776 F.2d 1085; *W.C. Smith*, 596 F.Supp. 515. More importantly, this court does not meet this issue *ab initio*. We lack the authority to make a *de novo* review of the issues presented. The Commission rejected the *General Electric* case, and the only question before us is whether the I.C.C.'s rejection was permissible. We hold that it was.

V.

Petitioners final argument is that the Commission's decision should be reversed because it indicates a departure from the previous I.C.C. policy of discouraging inadvertence clauses. Brief for petitioner at 20-24 (*see e.g., Loss and Damage Claims*, 340 I.C.C. 515, 522 (1972) (released rates must be agreed to in a written declaration)). However, it is well-settled that:

> [r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither supposed to regulate the present and the future with-

in the inflexible limits of yesterday.

American Trucking Assocs. v. Atchison, Topeka and Santa Fe Ry. Co., 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967). That the I.C.C. may have changed its position on this issue does not constitute reversible error under our limited standard of review.

VI.

We have carefully considered all contentions presented by the petitioner, but settled law dictates that the reviewing court may not impose its own construction of a statute when the agency administering that statute has previously construed it. Our role here is to determine whether the agency's determination "is based on a permissible construction of the statute." *Chevron* 467 U.S. at 843, 104 S.Ct. at 2782. We conclude that it was. The Commission's decision on inadvertence clauses was within its discretion to address as a function of "filling in the gaps of Congressional authorization." *Id.*

Accordingly, the petition for review will be denied.

APPENDIX B

SERVICE DATE
JAN 23 1989

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30102

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE, INC.

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, *ET AL.*[1]

Decided: January 13, 1989

National Small Shipments Traffic Conference, Inc. and Drug and Toilet Preparation Traffic Conference, Inc. (complainants) seek a finding that certain tariff provisions published by 10 motor carriers purporting to limit liability violate 49 U.S.C. 10730 and 11707 and should be ordered canceled.

Howard's, Walsh, Hyman, Midland, Ward, and New Penn move to dismiss the complaint against them. Complainants replied to the New Penn, Walsh and Ward motions and consented to dismissing the complaint against Walsh and Ward. Roadway filed an answer to the complaint and interposed an affirmative defense that the complaint fails to state a claim upon which relief may be granted. Red Star Express Lines, Red Star Express Lines of Quebec, and Consolidated Freightways did not file answers.

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[1]The other carrier defendants are Hyman Freightways, Inc., Howard's Express, Inc., Midland Transport, Ltd., New Penn Motor Express, Inc., Red Star Express Lines, Red Star Express Lines of Quebec, Roadway Express, Inc., Walsh Trucking Service, Inc., and Ward Trucking Corp.

PROCEDURAL MATTERS

By pleading filed October 7, 1988, complainants seek to amend the complaint to add four new carrier defendants. We will deny complainants' request to amend the complaint.[2] The addition of new parties now will result in needless and unnecessary delay in the disposition of this proceeding. Moreover, inasmuch as complainants raise purely legal issues, adding defendants to the proceeding would not help us to reach a more informed decision or lead to a different result. The complaint as originally filed seeks cancellation of certain tariff items maintained by defendants and any other similar tariff items published by defendants which contain "automatic" releases of liability. Adding new defendants and additional tariff items will not alter the legal issues presented by the complaint.

Also, on October 5, 1988, complainants submitted a reply to an earlier motion to dismiss filed by Midland. Although the reply is a late-filed pleading, we will admit it to the record.

In view of our ultimate decision to dismiss the complaint against all remaining defendants for failure to state a claim upon which relief may be granted, we will not fully discuss or rule upon all the motions to dismiss.

BACKGROUND

Complainants contend that the various defendants have published specified tariff provisions that purport to impose "automatic" releases of dollar liability limits on shipments where shippers have not provided their agreement to do so

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[2]One of the four carriers sought to be added as defendants filed a pleading requesting dismissal of the motion to amend the complaint, and complainant replied. In view of our decision to deny the motion to amend the complaint, we will not discuss these pleadings.

in writing. (These releases prompt use of the phrase "released rates" to describe the tariff items. In return for "releasing" the value of the goods for liability purposes to a lower level, shippers obtain lower rates for the transportation.) Complainants cite, as illustrative, Item 3010-C of Roadway Express Tariff 301-C, ICC RDWY 301-C, which provides as follows:

> Item 3010-C
> *Used Machinery and Used Agricultural Implements*
> (1) Exceptions to the following commodities named in Tariff ICC NMF100 series:
>
> > Agricultural Implements or Parts as described in NMFC Items 8900 through 11622; [E8900-00] [X30]
> > Machinery Group as described in NMFC Items 114000 through 133454. [E11400-00] [X20]
>
> a. Commodities as described above, other than new will be accepted for transportation by carrier subject to the following:
>
> (1) Released to value not exceeding $.10 per pound. . . . 85% of applicable Class Rates.
>
> (2) Released to value exceeding $.10 per pound, but not exceeding $1.00 per pound. . . . 95% of applicable Class Rates.
>
> (3) Released to value exceeding $1.00 per pound, but not exceeding $2.50 per pound. . . . 97% of applicable Class Rates.
>
> (4) When consignor declares actual value exceeding $2.50 per pound, shipment will be rated at. . . . 150% of the applicable Class Rates.

2. If Consignor fails to declare a released value at time of shipment, shipment will be subject to the lowest released value herein .

3. Failure of the consignor to declare that commodity as "used" shall not alter the application of this item.

Complainants center their attack on item 2, commonly known as the "inadvertence clause." This clause applies the lowest released value specified in the tariff if the shipper fails to declare one of the higher released values at the time of the shipment. Complainants assail such items as violations of 49 U.S.C. 10730, which allows a carrier to limit its liability to a value "established by written declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation." Absent a requirement in the tariff for an express written agreement by the shipper, complainants assert that the assailed provisions are unlawful and must be ordered canceled. In support of their position, they cite an unprinted decision of the United States District Court for the Eastern District of Virginia, Alexandria Division, in C.A. No. 850417-A, *General Electric Company and Insurance Company of North America* v. *McLean Trucking Company* (Oct. 17, 1985) (*G.E.*)

All the responding defendants state that their tariffs do not violate 49 U.S.C. 10730. Some argue that their tariffs do not contain inadvertence clauses, while one (Howard's) notes that its tariff was established at the request of the sole shipper to which it applies. Legally most significant, however, are the answer of Roadway, and the motions to dismiss filed by Midland and Howard's. These respondents ask that the complaint be dismissed in light of several Commission and court decisions authorizing inadvertence clauses affer finding that the tariffs and the relevant bills of lading, taken together, did indeed constitute a "written agreement" and provide the ship-

per with a choice of liability levels. Indeed, Howard's points out that its tariff is similar to classification provisions approved by the Commission with the full support of complainants in *Machines, Data Processing, Classification Ratings*, 353 I.C.C. 661 (1977) (*Machines*). The *Machines* tariff was later found to be lawful in all respects in *Mechanical Technology Inc.* v. *Ryder Truck Lines*, 776 F.2d 1085 (2d Cir. 1985), (*Mechanical*). NASSTRAC in reply asserts that (1) many bills of lading do not clearly inform shippers of the consequences of failing to make an election; and (2) in any event, the act prohibits any tariff "forcing a shipper . . . to read all the print on [the] bills of lading and then . . . . take an affirmative step to retain full value coverage . . . ." Reply to Motion to Dismiss of Midland Transport Limited at 5. The court cases holding that various tariffs and bills of lading, taken together, adequately insulated the carrier from full value liability are, according to NASSTRAC, irrelevant to "[t]he essence of this proceeding, [which is] whether . . . it is unlawful [for any tariff] to impose an automatic release on the shipper." *Ibid.*

DISCUSSION AND CONCLUSIONS

49 U.S.C. 11707(c)(4) provides that a common carrier may limit its liability for loss of or injury to property transported under section 10730. Section 10730(a) allows a common carrier:

> to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation.

Otherwise, the statute provides that the motor carrier is liable up to the full value for any loss or damage to a shipment it

handles. 49 U.S.C. 11707(a)(1).

Complainants contend that defendants' tariff items impose automatic releases, without a specific declaration of value by the shipper, and are therefore unlawful because the shipper has not agreed in writing to these limits. They argue that a released rate item properly is one that provides for the application of a specific rate on a shipment only where a shipper affirmatively declares the value on the bill of lading and thus establishes the valuation for loss and damage purposes. According to complainants, there is no room in the law for an inadvertence clause.

Complainants' facial attack on tariffs containing so-called "automatic releases" of liability must be rejected. Their position has been examined on numerous occasions by the courts and found wanting. Stated simply, it is beyond question that inadvertence clauses are lawful under sections 11707 and 11730.

The tariffs complainants challenge are patterned after the released rates provisions approved in *Machines, supra*. Not only did complainants participate in that proceeding, they supported adoption of the released rates authorized there which included an inadvertence clause. *Id.* at 664. As complainants undoubtedly are aware, inadvertence clauses are regularly included in released rates tariff approved by the Commission to allow carriers to assign a classification when the shipper has failed to declare a value for its shipment to trigger application of a listed released value. These clauses are generally established to protect the carrier when it is tendered commodities of extremely high value. As the Commisssion observed in *Machines*, claims for loss and damage of these commodities "could be extremely harmful to large carriers and catastrophic to small carriers." 353 I.C. at 670. Without an inadvertence clause, shippers would be able unilaterally to im-

pose full liability on a carrier by choosing not to declare a shipment's value under a released rate tariff. Such a result would defeat the carrier's right to know the extent of its potential liability for loss and be compensated in proportion to the risk assumed. *Shippers National Freight Claim Council Inc.* v. *Interstate Commerce Commssion*, 712 F.2d 740, 746 (2d Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).[3] An inadvertence clause preserves the rights of both the carrier and shipper under a released rates tariff. It in no way eliminates the shipper's right to declare a shipment's value for liability purposes.

Numerous cases have upheld the legality of inadvertence clauses under sections 11707 and 11730. In *W.C. Smith, Inc.* v. *Yellow Freight Systems, Inc.*, 596 F.Supp. 515 (E.D. Pa. 1983) the court specifically ruled on the question of whether the written agreement requirements of section 11730 were satisfied where the tariff contained an inadvertence clause and that shipper failed to declare a released value on the bill of

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[3]Indeed, in *Machines*, the Commission approved the released rates tariff at issue, with the support of complainants here, without even addressing the automatic release provision. And any prior Commission statements categorically criticizing automatic release in *Released Rates on Small Shipments Tariff*, 361 I.C.C. 405, 413 (1979) (automatic releases can be a "trap for the unwary"), do not represent current Commission policy and indeed may contravene the statute as interpreted in numerous subsequent court decisions. Unlike the line of cases finding it an "unreasonable practice" under 49 U.S.C. 10701(a) for a carrier to charge a higher tariff rate because the shipper failed to comply with the purely technical notation requirement on the bill of lading that it performed the loading, counting and unloading of the freight, here the released value designation spaces and inadvertence clauses are a substantive means of establishing liability. The Commission will generally enforce a tariff endorsement or notation requirement where it serves some purpose related to the transportation provided, and is not otherwise unlawful. As noted above, these inadvertence clauses serve a legitimate purpose and are necessary to assign liability. The intent of released rates (*i.e.*, a lower rate in return for assumption of some liability) would be defeated if the shipper, simply by failing to state a value, obtained both a lower rate and full carrier liability.

lading. The court found that the necessary written agreement existed because the shipper agreed to be bound by the terms of the tariff when it chose not to exercise its right to declare a released value. *Id.* at 517.

There is no suggestion in any court decision on this issue that including an inadvertence clause in a released rates tariff is a proper basis for finding the tariffs assailed by complainants to be unlawful and ordering them canceled. Even the *G.E.* case cited by complainants (which involved factual circumstances that the court found compelling and which, we note, other courts have not followed) was premised not on the propriety of the tariff itself but on the court's conclusion that the particular bill of lading used there did not provide for a written agreement. Other cases, which have viewed the released rates provisions of the Act far differently from the *G.E.* court, have found both that the tariffs were lawful and that the particular bills of lading involved satisfied the "written agreement" requirement. *See, e.g., W.C. Smith, Inc.* v. *Yellow Freight Systems, Inc., supra; Mechanical; Cooperative Shippers, Inc.*, v. *Atchison, T. & S.F. Ry.*, 840 F.2d 447 (7th Cir. 1988). Most recently in *Digital Equipment Corp.* v. *Salvage Discount, Inc., et al.*, Civil No. 87-442-G (M.D. N.C., filed August 12, 1988), defendant's motion for summary judgment was granted when a shipper challenged the inadvertence clause at issue in *Mechanical.*

In view of this virtually unbroken string of decisions upholding the legality of inadvertence clauses in tariffs, we must dismiss complainant's facial attack on their use in defendants' tariffs. Unlike some litigation where a shipper claims that the clause has been misused or its existence has been concealed, here complainants argue that the mere presence of what they term "automatic releases" invalidates the tariffs of defendants and others. For the reasons outlined above complainants have failed to state a claim upon which relief may be granted and

their complaint must be dismissed.

One other matter deserves comment. Defendant Midland maintains that this Commission lacks jurisdiction over its tariff items because it is a Canadian domiciliary. In view of our findings above, it will not be necessary to address that issue in this proceeding.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request to amend the complaint is denied.

2. The complaint is dismissed.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3163

National Small Shipments, etc.,

Petitioners

vs.

United States of America,

Respondent

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM, SLOVITER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COEN, NYGAARD, AND ALDISERT,* *Circuit Judges*.

The petition for rehearing filed by Petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Las Mansmann
Circuit Judge

*Senior Judge Aldisert was limited to voting only for panel rehearing.

Dated: November 6, 1989

APPENDIX D

NATIONAL MOTOR FREIGHT CLASSIFICATION 100-P

RULES

STRAIGHT BILL OF LADING — SHORT FORM

ORIGINAL — NOT NEGOTIABLE
(To be printed on white paper)

Shipper's No.
Carrier's No.

(Name of Carrier) (SCAC)

RECEIVED, subject to the classifications and lawfully filed tariffs in effect on the date of the issue of this Bill of Lading.

At 19

From

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property, over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subjected to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Uniform Freight Classification in effect on the date hereof, if this is a rail or rail-water shipment, or (2) in the applicable motor carrier classification or tariff, if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to

(The Collect on Delivery shipments, the letters "COD" must appear before consignee's name or as otherwise provided in Item 430, Sec. 1.)

(Mail or street address of consignee — For purposes of notification only.)

Destination State County

Delivery Address (*To be filled in only when shipper desires and governing tariffs provide for delivery thereat.) Zip

Route

Delivering Carrier Car or Vehicle Initials No.

No. Packages	0 HM	Kind of Package, Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	Check Column

Subject to Section 7 of Condition of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of consignor)

If charges are to be prepaid, write or stamp here: "To be Prepaid."

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Carrier

Per

(The signature here acknowledges only the amount prepaid.)

Charges advanced:

$

(This statement may also be used to comply with the law requires that the bill of lading shall state whether it carries the shipper's weight.)

Note — Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

Shipper Agent

Per Per

Permanent post office address of shipper

0Mark with "X" to designate Hazardous Materials as defined in the Department of Transportation Regulations governing the transportation of hazardous materials. The use of this column is an optional method for identifying hazardous materials on bills of lading per Section 172.201(a)(10) of Title 49, Code of Federal Regulations. Also, when shipping hazardous materials, the shipper's certification statement prescribed in Section 172.204(a) of the Federal Regulations must be indicated on the bill of lading, unless a specific exception from this requirement is provided in the Regulations for a particular material.

APPENDIX E

RELEASED RATES ORDER MC NO. 1

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D.C., on the 16th day of January, A.D. 1936

The Commission having been petitioned on behalf of various motor carriers for authority to establish and maintain for the transportation of carpets and carpeting, graphite crucibles, hides, pelts or skins not dressed nor tanned, household goods, jeweler's sweepings, leather scrap, leatherboard scrap, ores, paintings and pictures, pottery, chinaware, earthenware, porcelainware or stoneware, printed matter, silk, raw, spun, schappe, or thrown, including organzine, singles, tram, warp, or yarns, watches and clocks, classification ratings dependent upon the released value of the property transported, and the matter having been considered and good cause therefor appearing:

It is ordered, That all motor carriers and their duly authorized agents or the duly accredited successors of such agents, be, and they are hereby, authorized to establish and maintain by filing and posting in the manner prescribed in Sections 217 and 218 of the Motor Carrier Act, 1935, truck-load and less-truck-load classification ratings for carpets and carpeting; graphite crucibles, hides, pelts, or skins not dressed nor tanned; household goods; jeweler's sweepings; leather scrap; leatherboard scrap; ores not otherwise indexed in the classification; paintings and pictures; pottery, chinaware, earthenware, porcelainware or stoneware, not otherwise indexed in the classification; printed matter; silk, raw, spun, schappe, or thrown, including organzine, singles, tram, warp, or yarns; watches and clocks, dependent upon the released value of the property declared by the shipper in writing, or agreed upon in writing, as set forth in the appendix attached to and made a part of this order.

It is further ordered, That changes may be made in any rating and container or packing specification established under authority of this order, but no change in commodity description or in the released valuations upon which the ratings are dependent may be made without specific authority of the Commission.

The Commission does not hereby approve the lawfulness, except under Section 219 of the Motor Carrier Act, 1935, and paragraph 11 of Section 20 of the Interstate Commerce Act, of any ratings or valuations which may be filed under this authority.

It is further ordered, That the ratings dependent upon released value filed under the authority of this order shall show in connection therewith the following notation:

> "Ratings herein based on released value have been authorized by the Interstate Commerce Commission in Released Rates Order MC No. 1, of January 16, 1936, subject to complaint."

By the Commission, Division 5.

GEORGE B. McGINTY

APPENDIX TO RELEASED RATE ORDER MC NO. 1

Carpets or Carpeting:

Rugs, N.O.I., value declared in writing by the shipper, or agreed upon in writing as the released value of the property in accordance witih the following (See Note 2):

If not exceeding $125.00 per 100 lbs., in burlapped bales or roll or in boxes, or wrapped in bundles, see Note 1 below.

If exceeding $125.00 per 100 lbs., and not exceeding $200.00 per 100 lbs., in boxes, see Note 1 below.

If exceeding $300.00 per 100 lbs., in boxes, see Note 1 below.

Note 1— The value declared in writing by the shipper or agreed upon in writing as the released value of the property, as the case may be, must be entered on Shipping Order and Bill of Lading as follows:

"The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ---------- per 100 lbs."

Note 2— If consignor declines to declare the value, or agree to released value in writing, shipment will not be accepted.

Hides, Pelts or Skins, not dressed nor tanned:

Hides, Pelts or Skins, not dressed nor tanned, N.O.I.: Dry, See Note below, in packages:
Released to value not exceeding $1.50 per pound
Released to value exceeding $1.50 per pound but not exceeding $5.00 per pound ----------
Released to value exceeding $5.00 per pound but not exceeding $7.50 per pound ----------
If declared or released value exceeds $7.50 per pound or shipper declines to declare or release value, NOT TAKEN.

Note— The value declared in writing by the shipper or agreed upon in writing as the released value of the property as the case may be, must be entered on Shipping Order and Bill of Lading as follows:

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ---------- per pound for each article.

If consignor declines to declare value or agree to released value in writing, the shipment will not be accepted.

APPENDIX F

SERVICE DATE
NOV 15 1982

INTERSTATE COMMERCE COMISSION

RELEASED RATES DECISION NO. FF-305
TRANSCONEX, INC. – GENERAL COMMODITIES

Decided OCT 21 1982

By Released Rates Application No. FF-455, Transconex, Inc., seeks authority to establish and maintain released rates on general commodities released to a value not exceeding $50 per shipment, unless a greater value is declared at time of shipment, subject to an additional charge of one percent of such declared value. The authority is sought to apply between Transconex's terminals located at inland points at Jacksonville and Maimi, FL and points and places in Puerto Rico and the U.S. Virgin Islands. Publication is to be made in tariffs to be filed with the Interstate Commerce Commission.

There were two protests to granting this application, one filed by the National Small Shipments Traffic Conference (NSSTC) and the other by the Drug and Toilet Preparation Traffic Conference (DTPTC). Both protested the proposed automatic release. They believe that a release of the carrier's liability must be accomplished by an affirmative act or it becomes a trap for the unwary.

WE FIND:

The sought authority is justified since it will enable shippers to choose whether they wish lower rates and greater claim exposure or higher rates and full carrier liability. However, the applicant seeks an "automatic release" of its liability which could result in a limitation of Transconex's liability for loss or damage without any actual notice to the shipper. The Commission considered such a provision in Ex Parte No. MC-98 (Sub 2) *Released Rate — Small Shipments Tariff*, 361

ICC 404, 415-417, and found it unjustified even in connection with small shipments. Therefore it will be denied. This means that Transconex, Inc. must obtain an actual written release from shippers.

The proposed released value provisions have also been revised to clarify that the released values apply either for an entire shipment or part of a shipment but not more than the actual loss or damage.

WE ORDER:

Transconex, Inc. is authorized to establish and maintain released rates on general commodities from inland points in Jacksonville and Miami, FL to points and places in Puerto Rico and the U.S. Virgin Islands, insofar as the Commission has authority to do so, by publishing the following provisions in its tariff or tariffs publishing rates on the subject traffic:

> Rates in this tariff are subject to a value declared in writing by the shipper or agreed upon in writing as the released value of the property of $50 per shipment, unless a greater value is declared at the time of shipment, subject to an additional charge of one percent of such higher declared value. The declared or released value shall apply to all or any part of a shipment but not more than the actual loss or damage.
>
> Rates herein based on released value have been authorized by the Interstate Commerce Commission in Relesaed Rates Decision No. FF-305 of OCT 21 1982, subject to complaint or suspension.

The Commission does not hereby approve the lawfulness, except under 49 USC 10730 and 11707, of any rate which may be established under the authority of this order.

By the Commission, Released Rates Board, Members Llewellyn, Simmons and Langyher.

Agatha L. Mergenovich
Secretary